No. 98329-1
(COA No. 17-2-01117-34)
51875-9-II
SUPREME COURT OF THE STATE OF WASHINGTON

REDSTONE BLACK LAKE 1, L.P. AND
REDSTONE BLACK LAKE 2, L.P.
AS SUCCESSORS IN INTEREST TO REDSTONE INVESTMENTS LLC,

Appellants below,

Respondents,

v.

GF CAPITAL REAL ESTATE FUND – INVESTMENT I, LLC,

Respondent below,

Petitioner.

On appeal from Thurston County Superior Court

GF CAPITAL REAL ESTATE FUND – INVESTMENT I, LLC'S PETITION FOR REVIEW

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I. INTRODUCTION

The decision by the Court of Appeals in this case restricts commercial parties' freedom of contract and eliminates the ability of parties in a commercial real estate transaction to allocate risk among themselves through an "as is" clause or through a broad and typical release of "any and all" claims arising from the transaction.

Rather than enforce the parties' real estate contract as written, the Court of Appeals created novel exceptions to commercial real estate contracts in Washington, borrowing from non-binding, inapposite residential real estate and medical malpractice law in the process. The Court of Appeals' new exceptions for commercial real estate contracts impairs the fundamental stability of real estate transactions in this state by creating additional—yet nebulous—protections for buyers. This Court should accept review to clarify the scope of established contact law and to confirm the acceptability of warranty disclaimers and tort claim releases in commercial real estate contracts.

II. IDENTITY OF PETITIONER

Petitioner GF Capital Real Estate Fund-Investment I, LLC ("GF Capital"), Respondent below, asks this court to accept review of the Court of Appeals decision terminating review designated in Part III of this petition.

III. COURT OF APPEALS DECISION

GF Capital asks the Court to grant review of the Court of Appeals' decision terminating review, issued as an unpublished opinion on February 25, 2020 ("Decision"). A copy of the slip opinion of the Decision is included as the Appendix at pages A-1 to A-21 ("App.").

IV. ISSUES PRESENTED FOR REVIEW

1. The Court should grant review under RAP 13.4(b)(4) because the Decision restricts, without legal basis, the ability of parties buying or selling commercial real estate to disclaim liability and allocate risk through an "as is" clause.

2. The Court should grant review under RAP 13.4(b)(4) because the Decision of the Court of Appeals undermines commercial parties' ability to allocate risk concerning fraudulent concealment through a contractual general release of tort claims.

V. STATEMENT OF THE CASE

A. The Black Lake Buildings

Petitioner GF Capital owned two commercial office buildings in Olympia, Washington: Black Lake 1 and Black Lake 2 (collectively the "BL Buildings"). CP 2. On May 2, 2014, GF Capital sold the BL Buildings to Respondents Redstone Black Lake 1, L.P. and Redstone Black Lake 2, L.P. (as successors in interest to Redstone Investments LLC) (collectively, "Redstone"). CP 232.

The BL Buildings are three-story office facilities built in 1984 and leased to the State of Washington Department of Licensing. CP 439-578.

The BL Buildings were maintained by a property management firm, which periodically engaged contractors and firms to address various building issues, including leaks and water damage. CP 989; *see also* CP 1288.

B. Redstone Is a Sophisticated Investor in Commercial Real Estate

Redstone is one of British Columbia's largest private real estate organizations, with a diversified portfolio of properties across Vancouver, Canada and the western United States. CP 1018. Redstone's principals have been involved in hundreds of commercial real estate transactions, involving hundreds of millions of dollars' worth of real estate. CP 1015; CP 1035. At the time of its purchase of the BL Buildings, Redstone had significant knowledge of and experience in the Pacific Northwest commercial real estate market. CP 627-29.

C. The Purchase and Sale Agreement

On March 14, 2014, GF Capital entered into a Purchase and Sale Agreement ("PSA") with Redstone, pursuant to which GF Capital agreed to sell four commercial real estate buildings, including the BL Buildings, to Redstone. CP 3. In negotiating and entering into the PSA, Redstone was represented by legal counsel who specialized in commercial real estate transactions and whom Redstone had used for other commercial real estate transactions. CP 662, 1044.

In Section 8.2 of the PSA, Redstone agreed that it was buying the

BL Buildings on an "As-Is, Where-Is, and With All Faults" basis, without representations or warranties of any kind, including relating to the condition of the BL Buildings. CP 643-44.[1] Consistent with the sale being "As-Is, Where-Is, and With All Faults," Redstone made promises to GF Capital, including that: (a) no person acting on behalf of GF Capital was authorized to make any representations about the condition of the Property; (b) no person had made any such representation; and (c) as of the closing, Redstone will have "independently and personally inspected the Properties" and "satisfied itself as to the condition of the Properties . . . and their suitability for [Redstone's] intended use." CP 632-99.

Under the PSA, Redstone was given until the end of the "Due Diligence Period," which was April 24, 2014, to make "any and all inspections, investigations, tests and studies of the Property as [Redstone] elects to make or obtain." CP 640. Also under the contract, Redstone was free to do any testing and inspections of the BL Buildings it desired—including invasive or destructive testing—provided that its testing and inspections did not materially interfere with GF Capital's or the tenant's use

[1] The provision stated, in part (with emphasis in original): "EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SALE OF THE PROPERTY IS AND WILL BE MADE ON AN 'AS IS,' 'WHERE IS,' AND 'WITH ALL FAULTS' BASIS, WITHOUT REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE . . . ."

of the property and provided that Redstone restored the property after testing. CP 655-56.

GF Capital and Redstone also agreed in the PSA that GF Capital would provide Redstone with specifically enumerated "due diligence materials" identified in Exhibit H to the PSA. CP 643, 1020. Redstone agreed in the PSA that it would conduct its own review of the due diligence materials. CP 643.

Finally, consistent Redstone's agreement to purchase the BL Buildings "As-Is, Where-Is, and With All Faults," and consistent with the requirement that Redstone conduct its own due diligence of the BL Buildings, Redstone gave GF Capital a comprehensive release of all claims—including tort claims and claims under "any other legal or equitable theory or basis of liability"—Redstone had or might have had with respect to the condition of the BL Buildings or "any other state of facts that exists with respect to the" BL Buildings. CP 2272-73.[2]

D. Redstone's Due Diligence Revealed Defects with the BL Buildings

Redstone conducted inspections of the BL Buildings, which

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[2] This provision of PSA stated, in part, that Redstone: "waives, releases and discharges any claim or cause of action . . . against Seller, whether based on breach of contract, breach of applicable law, strict liability, tort, or any other legal or equitable theory or basis of liability with respect to . . . the condition of the Property . . . [or] any other state of facts that exists with respect to the Property."

included meetings with the tenant and building walk-throughs. CP 632-99. In addition to Redstone's own inspection of the BL Buildings, Redstone engaged several contractors and an architectural firm to examine and evaluate the BL Buildings. Each of these contractors and specialists alerted Redstone to various problems with the BL Buildings.

For example, as part of its due diligence, Redstone asked a building envelope specialist to "tell us how we can repair" some of the areas of the thin brick veneer cladding on the BL Buildings. CP 713-14. The specialist did so. But Redstone did not perform the recommended work, despite being warned that if water got into the wall cavity of a building, it could damage the interior materials and potentially lead to mold. CP 1051-52.

Redstone also asked a commercial and residential window contractor for a quote on re-caulking and re-glazing the windows and seals in the BL Buildings. CP 720-21. The contractor advised that some of the "break metal between the windows is coming off and the caulking has failed" and "both buildings need to be checked out and fix the break metal, re seal it and or re anchored." *Id.* Redstone waited until after it bought the BL Buildings to perform the additional investigation recommended by the contractor. CP 824-31.

Finally, Redstone engaged Marx|Okubo Associates, Inc. ("Marx"), an architectural and engineering firm specializing in property condition

assessments, to assess the BL Buildings. Marx observed and reported to Redstone various defects with the BL Buildings including leaks, evidence of water intrusion, and failed caulking throughout. CP 766-82. Moreover, Redstone understood that it had the right, under the PSA, to have Marx perform invasive testing as part of the assessment, but it did not ask Marx to do any invasive testing. CP 1059.

Redstone further understood that some of the problems with the BL Buildings' exterior highlighted in the Marx report could indicate "damage to the substructure, in which case now you have cracks that will allow water penetration into the wall cavity of the wall." CP 1031. Finally, Redstone also understood that problems indicated in Marx's report would need to be addressed because moisture could infiltrate the building. CP 1068-70.

E. Redstone Obtained an Amendment to the PSA and Reduction in Purchase Price Because of the Defects Revealed During the Due Diligence Period

On April 20, 2014, after receiving the recommendations and reports about the BL Buildings noted above, Redstone sought to amend the PSA to reduce the purchase price for the BL Buildings. CP 784-86. Part of Redstone's basis for the requested purchase price adjustment related to a "deficiency" with the window systems and seals in the BL Buildings. *Id.*

GF Capital agreed to amend the PSA and reduce the purchase price by $500,000. CP 794-99. In exchange, Redstone provided GF Capital with

a comprehensive release of claims, including all damages caused by and all claims arising from the matters identified in a "Properties Condition Email" attached to the release, which identified problems with the window systems and seals. *Id.* Redstone did not immediately fix the issues addressed in the amendment to the PSA. CP 601.

F. Redstone Discovered Rot and Mold in the BL Buildings in 2015

Roughly a year and a half after closing, Redstone engaged an exterior plastering and siding company to provide assessment reports for the buildings. CP 824-31. Among other issues, these October 2015 building assessments showed water damage, rot, and mold behind windows and walls at the BL Buildings. *Id.* Redstone took no action to address any of these concerns at the time. CP 1072-75.

Indeed, Redstone took no action for another year until October 2016, when the tenant discovered water seals and caulking had failed in two areas while performing a remodeling project at Black Lake 2. CP 833-34. It was only at that point that Redstone engaged an engineering firm to assess the building envelope at the BL Buildings. CP 580-602. The firm concluded that buildings' windows, "adjacent panels," and "their interfaces" were the most likely source of water intrusion into the walls. *Id.*

G. Procedural History and Decision Below

Nearly three years after it purchased the BL Buildings, Redstone

sued GF Capital in Thurston County Superior Court on March 13, 2017, claiming fraudulent concealment, negligent misrepresentation, and breach of warranty related to the water ingress issues discovered in the building in late 2015 and 2016. CP 1-6. Finding that no material fact existed as to any of Redstone's claims, the trial court granted GF Capital's motion for summary judgment and dismissed all of Redstone's claims. CP 1202-17. Redstone appealed the trial court's judgment only as to its fraudulent concealment claim.[3] CP 159-78.

In reviewing the trial court's decision, the Court of Appeals first reviewed the parties' contract—the PSA. App. A-10. The Court of Appeals' analysis should have ended with a review of the PSA. But, instead of enforcing the plain language in the "as is" clause of the PSA, the Court of Appeals applied another appellate division's precedent about residential real estate contracts to hold that the "as is" clause in the PSA applied only to *unknown* defects—not known defects—and so could not immunize GF Capital from Redstone's fraudulent concealment claim. The Court of Appeals refused to enforce the parties' contract and instead created a novel exception to "as is" clauses in commercial real estate contracts, rendering such clauses nearly worthless. App. A-10 to A-11.

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[3] Redstone also appealed GF Capital's attorney fees award, which is not at issue in this petition.

The Court of Appeals similarly maneuvered around the parties' broad release in the PSA. Rather than enforce Redstone's release of any possible tort claim against GF Capital, the Court of Appeals created the new rule that a commercial contract release is ineffective against fraud claims absent language specifically disclaiming fraud. For this novel proposition, the Court of Appeals again relied on another division's precedent concerning fraudulent inducement—not fraudulent concealment—in a medical malpractice case. App. A-11 to A-12.

Because the Court of Appeals ignored the language of the parties' contract and crafted novel exceptions to the bargaining power between buyers and sellers of commercial real estate previously unrecognized in Washington law, this Court should grant review to explain and ensure correct application of commercial real estate releases in Washington.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court should grant review under RAP 13.4(b)(4) because the Decision of the Court of Appeals restricts, without legal basis, the ability of parties buying or selling commercial real estate to disclaim liability and allocate risk through an "as is" clause.

Parties to real estate purchase and sale agreements may use an "as is" clause to disclaim any warranties or representations and to transfer the risk of defects to the buyer. *See, e.g.*, *Olmsted v. Mulder*, 72 Wn. App. 169, 176, 863 P.2d 1355, 1358–59 (Div. I 1993) ("The term implies that the

property is taken with whatever faults it may possess and that the seller or lessor is released of any obligation to reimburse the purchaser for losses or damages that result from the condition of the property."). Parties to commercial real estate purchase and sale agreements use an "as is" clause when the seller is not making any representations about the property. *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 40, 114 P.3d 664, 668 (Div. II 2005).

GF Capital and Redstone had such a clause in the PSA. CP 2272-73, App. A-4. However, the Court of Appeals refused to enforce the clause, holding instead that an "as is" clause in a commercial real estate contract can apply only to *unknown* defects. App. A-10 to A-11. The Court of Appeals erased the parties' agreed contractual terms and undermined commercial parties' ability to allocate risks for known defects. This Court should accept review to clarify the permitted and enforceable use of "as is" clauses in commercial real estate contracts.

The Court of Appeals' Decision undermines fundamental contractual rights in Washington on which buyers and sellers of commercial real estate rely. If a seller of real estate represents something about the condition of the property sold and the representation is inaccurate, then the buyer may have a breach of warranty or fraudulent misrepresentation claim. But when the contract contains an "as is" clause, the seller states—and the

buyer expressly acknowledges—that the seller is not making any representation about the condition of the property. *Warner*, 128 Wn. App. at 41, 114 P.3d at 669 ("[A]n 'as is' clause is unambiguous: the seller makes no warranties regarding the item sold.") The purpose of the clause is to protect the seller from a claim that it should have, but did not, make certain representations. GF Capital and Redstone used this language and unambiguously agreed that GF Capital was making no representations about the condition of the property. CP 2272-73, App. A-4 ("EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SALE OF THE PROPERTY IS AND WILL BE MADE ON AN 'AS IS,' 'WHERE IS,' AND 'WITH ALL FAULTS' BASIS, WITHOUT REPRESENTATIONS AND WARRANTIES OF ANY KIND . . . .") (Emphasis in original).

Nonetheless, relying on another appellate decision from a 2005 residential real estate case, the Court of Appeals here held that an "as is" clause cannot immunize a seller of commercial real estate from fraudulent concealment liability for known defects. App. A-10 to 11 (citing *Sloan v. Thompson*, 128 Wn. App. 776, 780, 115 P.3d 1009, 1011 (Div. I 2005)). Neither Redstone nor the Court of Appeals cited a basis for expanding *Sloan*, which itself is based, in part, on Florida and West Virginia law. *Sloan*, 128 Wn. App. at 790, 115 P.3d at 1016, n. 39. Yet, according to the

Decision, now an "as is" clause in a commercial real estate contract only applies to unknown defects, and therefore a buyer can avoid an "as is" clause simply by pointing to some evidence that the alleged defect might have been known to the seller. App. A-11.

This holding renders an "as is" clause useless in commercial real estate contracts because sellers already are not liable for defects they are not aware of, unless they affirmatively represent to a buyer that there are no defects when they are ignorant as to whether that is true. Therefore, in the case of an *unknown* defect, an "as is" clause is surplusage. Yet this precisely is the scenario to which the Court of Appeals confined enforcement of "as is" clauses. An "as is" clause is only meaningful when the alleged defect is *known,* constructively known, or allegedly known. If a defect is actually known to the seller, and absent an appropriate disclaimer, the seller might be liable for fraudulent concealment. *See Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672, 674 (1960) (defining elements of fraudulent concealment as seller's superior knowledge of defect, which buyer lacks). Thus, coupled with due diligence and other tools, sophisticated commercial parties—like GF Capital and Redstone—use "as is" clauses to allocate risk in real estate transactions.

The Court of Appeals eliminated that possibility in commercial real estate transactions and effectively made "as is" clauses worthless. The rule

established by the Court of Appeals precludes commercial parties from allocating the risk of known, constructively known, or allegedly known defects through "as is" clauses. This undermines the commercial real estate market by injecting uncertainty: absent the knowledge that an "as is" clause can provide protections and appropriately allocate risks, buyers and sellers lose a central tenet underlying real property sales. This is harmful public policy because, as Washington law has long recognized, parties to a commercial real estate transaction are fundamentally different from those in a residential contract—commercial parties are more sophisticated, better able to protect themselves, and ought to be able to allocate their respective risks by contract. *Atherton Condominium Apt.-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 518-19, 799 P.2d 250, 258 (1990) (explaining evolution of caveat emptor doctrine for residential dwellings). Sophisticated commercial parties should be permitted to allocate the risk of both unknown and known defects, and thus provide repose to the parties, stability in the transaction, and assurance in the market.

The PSA here exemplified this principle in Washington because coupled with the "as is" clause were extensive rights of the buyer, Redstone, to inspect the property and even do destructive testing. CP 1059. The seller (GF Capital) disclaimed all warranties and representations about the property. The buyer (Redstone) was permitted to do more than just look

around—it was allowed to inspect thoroughly and with destructive testing almost any part of the buildings it wanted. CP 655-656. The parties thus chose to allocate their respective risks from this type of arrangement through an "as is" clause.

However, the Court of Appeals upended that bargained-for exchange by eliminating the application of the "as is" clause in the only meaningful context, i.e., known defects. App. A-10 to 11. The result is an unwarranted thumb on the scale for commercial real estate buyers. Now, buyers may receive (after substantial bargaining) extensive pre-purchase property inspection rights, but they can refuse to exercise those rights and then turn around and sue the seller—who made no representations—for allegedly "concealing" a defect that the parties agreed the seller had no duty to disclose.

The result of the Court of Appeals' Decision is that, in this state, commercial real estate buyers can eat their cake and have it too, and commercial real estate sellers cannot contract around certain risks. This unbalanced bargaining position should not be the policy of Washington. The Court should accept review of the Court of Appeals' Decision to protect the stability and certainty of contractual rights created by "as is" clauses in commercial real estate transactions.

B. The Court should grant review under RAP 13.4(b)(4) because the Decision of the Court of Appeals undermines commercial parties' ability to allocate risk concerning fraudulent concealment through a contractual general release of tort claims.

A release of tort claims in a commercial real estate contract should bar a claim for the tort of fraudulent concealment. The PSA between GF Capital and Redstone contained such a release. App. A-4, CP 2272-73. But the Court of Appeals erroneously held this release to be ineffective against Redstone's claim for fraudulent concealment because the release failed to mention that claim specifically. App. A-11 to A-12. This holding limits the freedom of contract in Washington, adds further instability to commercial real transactions, and should be reviewed by this Court.

The contract here contained a broad, comprehensive release of claims—expressly including tort claims and any other "legal or equitable" basis of liability—"with respect to . . . the condition of the Property." App. A-4, CP 2272-73. This should have released a potential claim of fraudulent concealment by Redstone against GF Capital. Indeed, the entire basis of Redstone's claim is that GF Capital knew of and failed to disclose a "condition" of the BL Buildings. App. A-15. The Court of Appeals even acknowledged that tort claims generally may be released through contract the way the PSA did, but held, in effect, that a fraudulent concealment claim could not be released without using the word "fraud." *Id.* at A-12.

It is difficult to conceive of a tort claim, other than fraud, that a buyer of real estate would bring against a seller concerning the condition of the property—at least not where, as here, the seller made no affirmative representations about the property. Fraud is a tort. *See Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 159, 744 P.2d 1032, 1066 (1987), *as amended*, 109 Wn.2d 107, 750 P.2d 254 (1988). Thus, the plain language of the PSA's release was intended to cover fraud claims. Nonetheless, the Court of Appeals refused to enforce a broad, express release between sophisticated commercial parties merely because the contract said the seller was releasing "tort" claims rather than "fraud" claims. App. A-11.

To justify this rule requiring magic language, the Court of Appeals relied on a single case involving medical malpractice and a claim of fraud in the inducement of the release itself. App. A-11 (citing *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 93, 371 P.3d 84 (Div. I 2016)). But that case—besides not binding this Court—is inapposite. In *Hawkins*, the plaintiff patient relied on her healthcare provider's representation that it had provided her with complete and accurate medical records in deciding to settle her lawsuit against the provider. *Hawkins*, 193 Wn. App. at 90, 371 P.3d at 87. The plaintiff also signed a release stating that she did not rely on any representation by her provider about the nature

and extent of her injuries or damages. *Id.* When the plaintiff later discovered that the provider had not given her complete and accurate records, the appellate court permitted her lawsuit to proceed because: (1) her release was not a "general" one and (2) the release itself was induced through the provider's fraudulent withholding of the complete and accurate medical records. *Id.*, 193 Wn. App. at 98 and 101, 371 P.3d at 91-92.

Here, neither factor was present to justify the Court of Appeals' broad extension of *Hawkins*. The release in the PSA *is* a general one. It is hard to conceive of a release more general than one that "waives, releases and discharges any claim or cause of action . . . whether based on . . . tort, or any other legal or equitable theory or basis of liability with respect to . . . the condition of the Property . . . [or] any other state of facts that exists with respect to the Property." App. A-4, CP 2272-73. Even if this release were not general, such an extensive waiver of liability in a commercial real estate contract warrants a different type of evaluation—given the parties' respective bargaining positions—than that applied to a waiver between an individual consumer-patient and her healthcare provider.

Moreover, Redstone has not alleged that the general release in the PSA was procured or *induced* through fraud. Redstone's sole claim on appeal is a claim for fraudulent *concealment*. App. A-2, n.2. A claim for fraudulent inducement of a release itself is fundamentally different from a

claim of fraudulent concealment of a real estate defect. *Compare Chamberlain Group, Inc. v. Nassimi*, W.D. Wash. No. No. C09–5438, 2010 WL 4286192, *6 (Oct. 25, 2010) (citing *Farrell v. Score*, 67 Wn.2d 957, 958–59, 411 P.2d 146 (1966)) (enumerating elements of fraudulent inducement) *with Obde*, 56 Wn.2d at 452, 353 P.2d at 674 (identifying elements of fraudulent concealment). Fraudulent inducement of the release makes the release itself suspect. As in *Hawkins*, the theory is that the releasor entered the release only because the other party lied to her and that, but for a misperception about the basis or scope of the release, the release would not have been secured.

Releasing a fraudulent concealment claim, however, is different. The alleged misrepresentation is preexisting and concerns *something other than the release*. A fraudulent concealment claim does not allege confusion or unfairness about the release itself; rather, it alleges concealment of a "condition of the property." To be sure, neither side may have perfect knowledge of every aspect of the transaction or everything being released, but that is true almost any time commercial parties enter a release—known and unknown claims are given up in exchange for consideration deemed sufficient by the releasor.

Simply put, there is no basis in Washington law or public policy for refusing to enforce a release of tort claims against a fraudulent concealment

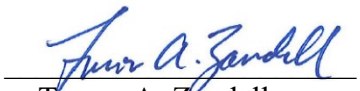
claim. As above with "as is" clauses, the Court of Appeals' Decision limits the freedom of contract in commercial real estate transactions, reallocates risks in the bargained-for allocation from the buyer to the seller, and makes it difficult for sellers to transfer risks to the buyers—even when the seller pays monetary consideration to transfer the risk. If the release in the parties' PSA here does not apply to fraudulent concealment claims, then that release, and any general release, loses a significant amount of meaning. The Court of Appeals should not have extended—or created—law in order to read a contractual provision as meaningless and to circumscribe the ability of parties to a commercial real estate contract to release tort claims relating to the condition of the real estate being sold. This Court should accept review and clarify that Washington law does not permit this.

VII. CONCLUSION

Petitioner GF Capital asks this Court to grant review and schedule it for argument at the earliest opportunity.

Respectfully submitted this 26th day of March, 2020.

PHILLIPS BURGESS, PLLC

By: 

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DECLARATION OF SERVICE

Crystal Maynor declares as follows:

I am a resident of the State of Washington, over the age of 18, and competent to give testimony in court. I make this declaration based on personal knowledge.

On the date above the signature below, I sent out for service upon the below-listed party, at the address and in the manners described below, the following document appended hereto:

- GF Capital Real Estate Fund – Investment I, LLC's Petition for Review

Traeger Machetanz Davis Wright Tremaine, LLP 1201 Third Avenue, Suite 2200 Seattle, Washington 98101 *Of Attorneys for Respondent*	☐	U.S. First-Class Mail, postage prepaid
	☐	Hand Delivered via Legal Messenger
	☐	Certified Mail w/return receipt requested
	☐	Electronic Court Efile:
	➡	Electronically via email: ***traegermachetanz@dwt.com***
	☐	Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED: this 26th day of March, 2020, at Olympia, Washington

Crystal Maynor
Paralegal

0117144.0612375 4810-4923-6407v5

APPENDIX A

Pages

Filed
Washington State
Court of Appeals
Division Two

February 25, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

REDSTONE BLACK LAKE 1, L.P, and REDSTONE BLACK LAKE 2, L.P. as successors in interest to Redstone Investments, LLC, Appellant, v. GF CAPITAL REAL ESTATE FUND – INVESTMENT I, LLC, Respondent.	No. 51875-9-II UNPUBLISHED OPINION

WORSWICK, J. — This case involves the sale of two commercial office buildings, Black Lake 1 and Black Lake 2 (collectively, the BL Buildings). GF Capital Real Estate Fund-Investment I LLC (GF Capital) sold the BL Buildings to Redstone Investments LLC[1] (Redstone) in 2014.

In 2017, and after discovering water infiltration, rot, and mold throughout the BL buildings, Redstone sued GF Capital, alleging that it had (1) breached warranties in the Purchase and Sale Agreement (PSA) and "PSA Amendment," (2) made negligent misrepresentations about the properties, and (3) fraudulently concealed defects in the properties. The trial court granted GF Capital's motion for summary judgment dismissal on all three claims. The trial court also awarded GF Capital attorney fees.

[1] Redstone Black Lake 1 L.P. and Redstone Black Lake 2 L.P. are the successors in interest to Redstone Investments LLC.

Redstone appeals, arguing that the trial court erred when it dismissed Redstone's fraudulent concealment claims and awarded attorney fees to GF Capital.[2] GF Capital argues that Redstone's claims are barred by provisions in the PSA and PSA Amendment.

We hold that (1) Redstone's claims are not barred by the PSA, (2) a question of material fact exists regarding whether the PSA Amendment bars Redstone's claims, and (3) a question of material fact exists regarding Redstone's fraudulent concealment claim. Because we reverse summary judgment dismissal of the fraudulent concealment claim, we also reverse the trial court's award of GF Capital's attorney fees. Accordingly, we reverse and remand for further proceedings.

FACTS

A. *Overview*

GF Capital owned several commercial buildings, including two known as Black Lake 1 and Black Lake 2. In 2014, GF Capital and Redstone entered into a PSA for Redstone to purchase the BL Buildings. The PSA allowed for a due diligence period, during which Redstone inspected the BL Buildings and sought documentation from GF Capital. Following that due diligence period, the parties executed a PSA Amendment to compensate for certain deficiencies in the BL Buildings. A year and a half after the sale, Redstone discovered mold, rot, and decay at the BL Buildings.

[2] Redstone does not appeal the trial court's decision to dismiss Redstone's breach of warranty or negligent misrepresentation claims.

Redstone sued GF Capital alleging fraudulent concealment, negligent misrepresentation, and breach of warranty. GF Capital moved for summary judgment seeking dismissal of all three claims. In its opposition to summary judgement dismissal, Redstone identified mold, rot, and decay as the defect in the BL Buildings. The trial court granted the summary judgment motion and also awarded GF Capital attorney fees.

B. *GF Capital's Ownership of the Buildings*

During GF Capital's ownership of the BL Buildings, GF Capital employed Sierra Property Management, owned by Brad McKinley, to manage some of its property, including the BL Buildings. McKinley maintained the BL Buildings, sending monthly reports and bills to GF Capital.

Over the course of GF Capital's ownership, the BL Buildings experienced reoccurring issues regarding water intrusion, mold, and rot. McKinley periodically used contractors to address these problems. On multiple occasions, Servpro dried out areas of the buildings and remediated areas with mold.[3] McKinley also used Stephen Passero's company, Rainshine, to address these water-related issues. During one of those repairs, Passero alerted McKinley to rotten plywood behind the window flashings. McKinley instructed Passero to reseal the panels and cover up the rotten wood.

Before GF Capital put the BL Buildings on the market, McKinley proposed exterior repairs to prevent water intrusion. There is no evidence that GF Capital completed those repairs. GF Capital then listed the BL Buildings for sale along with an offering memorandum.

[3] The effectiveness of these remediation efforts was later contested by Redstone.

C. *PSA, Due Diligence Period, and PSA Amendment*

1. *PSA*

GF Capital and Redstone entered into a PSA for the purchase of the BL Buildings, along with two other buildings, for $16.5 million. Relevant here are the PSA's paragraphs 8.2 and 23.6. Paragraph 8.2 of the PSA contained specific language regarding the condition of the BL Buildings and Redstone's release of claims against GF Capital. Paragraph 8.2 stated:

> EXCEPT AS SPECIFICALLY SET FORTH IN THIS AGREEMENT, THE SALE OF THE PROPERTY IS AND WILL BE MADE ON AN "AS IS," "WHERE IS," AND "WITH ALL FAULTS" BASIS, WITHOUT REPRESENTATIONS AND WARRANTIES OF ANY KIND OR NATURE, EXPRESS, IMPLIED OR OTHERWISE, INCLUDING BUT NOT LIMITED TO THE DISCLAIMED MATTERS. THIS COVENANT SHALL SURVIVE CLOSING. Buyer specifically acknowledges and agrees that . . . Buyer . . . hereby waives, releases and discharges any claim or cause of action it has, might have had or may have against Seller, whether based on breach of contract, breach of applicable law, strict liability, tort, or any other legal or equitable theory or basis of liability with respect to: (i) the Disclaimed Matters, (ii) the condition of the Property as of the Closing Date, (iii) the past, present or future compliance of the Property with Environmental Laws or any other federal, state or local laws or regulations, . . . or (iv) any other state of facts that exists with respect to the Property.

Clerk's Papers (CP) at 2272-73.

The PSA also contained language regarding attorney fees in the event of litigation. Paragraph 23.6 of the PSA stated:

> [I]f any action be commenced (including an appeal thereof) to enforce any of the provisions of this Agreement . . . then the unsuccessful party therein shall pay all costs incurred by the prevailing party therein, including reasonable attorneys' fees and costs, court costs and reimbursements for any other expenses incurred in connection therewith . . . .

CP at 2289. Notably, the language in paragraph 8.2 did not specifically release fraud claims.

2. *Due Diligence Period*

The PSA allowed for a due diligence period. Redstone requested GF Capital's documentation of specific repairs to the BL Buildings. GF Capital failed to provide specific documentation regarding repairs, although it possessed these documents.

Redstone contacted Capitol Glass and Marx|Okubo (Marx) to inspect parts of the BL Buildings. Capitol Glass submitted a quote for window repairs to Redstone, and Marx developed a property condition assessment. During the due diligence period, Redstone was permitted to conduct destructive testing, although it failed to conduct such tests.

a. *Capitol Glass Window Quotes*

Ayaz Velji, Redstone's vice president, e-mailed Capitol Glass, seeking a quote to reseal and glaze the windows for the BL Buildings. Specifically, Velji asked for a quote "on re caulking and re glazing all of the windows/seals" for BL buildings and an opinion on when that work would need to be completed. Justin Perry, a Capitol Glass employee, responded on April 15, 2014. Perry provided three quotes: the first quote provided a price for replacing only the failed window units of the BL Buildings, the second quote addressed fixing the failed units and older scratched units in these buildings, and the third quote included checking "each window for need of re seal, and or re anchor of break metal."[4] CP at 724. The third quote contained the following language:

[4] "Break metal" are metal panels that act as dividers between windows. These are also referred to as divider panels, spandrel panels, and metal panels. We use the term "break metal."

> Window problems; most all of the window units in buildings 1 and 2 are very old and badly scratched they are not all failing at this time but it is a matter of time before they do fail. Some of the break metal between the windows is coming off and the caulking has failed both buildings need to be checked out and fix the break metal, re seal it and or re anchored.

CP at 724.

Perry later explained that his quote related to checking "each window for need of re seal, and or re anchor of break metal." CP at 724. He stated that the unanchored break metal and failed caulking created the potential for water and moisture getting into buildings. However, Perry testified at his deposition that moisture contained in a failed double-paned window unit is not a "concern getting into the building." CP at 1091.

b. *Marx Property Condition Assessment*

Before its inspection, Marx submitted a building condition questionnaire to GF Capital that inquired about leaks and moisture intrusion. GF Capital declined to answer these questions.

Marx employees inspected the BL Buildings in April 2014. Marx's inspectors noted numerous issues with the windows, the brick veneer, and signs of past water intrusion. Regarding the buildings' windows, the report noted, "The various methods of installation and wet sealing suggest that there have been numerous repairs over the years due to water infiltration." CP at 773. Further, Marx "observed some metal coverings which had been sealed as if they were a gasket, but the sealing there has little-to-no benefit when protecting the windows from moisture infiltration." CP at 53. However, a Marx inspector testified that the BL Buildings' window systems were part of a "ribbon window system." CP at 1114. The inspector stated that the ribbon window system should have been set up to move infiltrating moisture back out to the building's exterior.

Marx's report also identified issues with the brick veneer. Marx observed cracking, spalling, and signs of past water infiltration. Marx did not observe evidence of wall moisture in the buildings' interiors, but recommended Redstone periodically investigate for cracks and spalling to prevent water infiltration. Redstone's efforts during the due diligence period did not reveal evidence of mold, rot, or decay.

3. *PSA Amendment*

After gathering information from Capitol Glass and Marx, Ali Nanji, Redstone's president, wrote in an e-mail to GF Capital's real estate broker that the BL Building windows were failing, "not just the seals but the water ingress." CP at 788. Further, he wrote, "The minimum was spent on these buildings, absolute minimum to keep them going." CP at 789. Nanji later clarified his message during his deposition, testifying that the water ingress he was referring to was not water intrusion into the BL Buildings, but rather the water into the double-paned glass that caused the window units to fog up and fail.

As a result of the property condition assessment, Redstone requested amending the PSA to lower the purchase price of the buildings. Redstone's request for a lower price was based on Redstone's discovery of several property deficiencies, including the windows.

The parties agreed to a PSA Amendment. The PSA Amendment listed deficiencies in the BL Buildings, reduced the purchase price by $500,000, and contained a release regarding "certain maintenance items" identified in an attached e-mail the parties termed the Property Condition Email. CP at 794. The PSA Amendment contained language identical to the PSA's claim-release language regarding the properties' deficiencies detailed in the Property Condition E-mail. The PSA Amendment stated that Redstone released any claims against GF Capital

"based on breach of contract, breach of applicable law, strict liability, tort, or any other legal or equitable theory or basis of liability." CP at 794-95. The PSA Amendment release did not specifically release fraud claims.

The Property Condition E-mail detailed multiple deficiencies in the properties that were not identified in the offering Memorandum. The Property Condition E-mail noted that "291 window units" in the BL Buildings would need to be replaced. CP at 798. Further, the Property Condition E-mail noted that "additional units" required resealing. CP at 798. The Property Condition E-mail listed the "Window System" as an additional repair cost of $235,000 not previously identified in the offering Memorandum. CP at 798. The Property Condition E-mail also stated, "Needless to say the window system and seals should have been regularly replaced and serviced to avoid the accumulated costs currently being faced." CP at 798.

D. *Redstone's Ownership of the Buildings*

Redstone purchased the BL Buildings in April 2014. Eighteen months later, in October 2015, Plastering Plus Northwest inspected the BL Buildings and found water damage, rot, and mold behind windows and walls. It appears from our record on appeal that Redstone did not remediate these issues following Plastering Plus Northwest's inspection.

About a year later, Redstone discovered additional mold, rot, and decay inside the wall cavities of the BL Buildings that was hidden until it opened a wall during the course of a tenant improvement project. Following the discovery of this mold and rot, JRS Engineering inspected the BL Buildings. JRS Engineering concluded that the water intrusion and ensuing mold and rot was most likely caused by the exterior break metal panels between the windows and the joints by which the break metal panels are attached. The mold, rot, and decay caused the BL Buildings'

tenant to vacate the premises. Redstone estimated the cost to repair the BL Buildings at over $3 million dollars.

One of the Plastering Plus Northwest inspectors testified in a deposition about his October 2015 findings. He stated that it was highly likely that the water damage, mold, and rot he discovered in October 2015 was present when the sale took place in April 2014. Further, Passero testified that the rot had developed over the course of years, back to GF Capital's time as owner.

E. *Procedural History*

Redstone sued GF Capital alleging fraudulent concealment, negligent misrepresentation, and breach of warranty. GF Capital moved for summary judgment dismissal on all three claims.

The trial court granted GF Capital's motion for summary judgment dismissal. The trial court awarded GF Capital attorney fees based on the attorney fee provision in the PSA, RCW 4.84.330, and RCW 4.84.010. Redstone appeals the summary judgment dismissal of its fraudulent concealment claim and the award of attorney fees.

ANALYSIS

I. SUMMARY JUDGMENT LEGAL PRINCIPLES

We review summary judgment decisions de novo and perform the same inquiry as the superior court. *Lakey v. Puget Sound Energy, Inc*., 176 Wn.2d 909, 922, 296 P.3d 860 (2013). We view the evidence, and all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). A material fact is one upon which

the outcome of the litigation depends. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004).

A defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case and (2) the plaintiff fails to come forward with evidence creating a genuine issue of material fact on an element essential to the plaintiff's case. *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 699, 324 P.3d 743 (2014). Where reasonable minds could reach but one conclusion from the admissible facts, summary judgment should be granted. *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 12 n.2, 98 P.3d 491 (2004).

II. "AS IS" CLAUSE AND RELEASES IN THE PSA AND PSA AMENDMENT

As a threshold issue, GF Capital argues that language in the PSA and PSA Amendment bars Redstone's claims. Specifically, GF argues that the "as is" clause, the PSA release, and the PSA Amendment release bar Redstone's claims. Br. of Resp't at 21. We hold that Redstone's fraud claims are not barred by the PSA. However, Redstone raises an issue of material fact regarding whether the PSA Amendment bars its claims.

A. *PSA Does Not Preclude Fraudulent Concealment Claims*

GF Capital argues that the "as is" clause and the general release contained in the PSA bar Redstone's fraudulent misrepresentation claims. We disagree.

1. *"As is" Clause*

A purchase and sale contract containing an "as is" clause does not immunize a seller from fraudulent concealment liability. *Sloan v. Thompson*, 128 Wn. App. 776, 790, 115 P.3d 1009 (2005). "Although courts routinely enforce such 'as is' clauses allocating the risk of *unknown*

defects to the buyers, to do so where the sellers *knew* about the defects and withheld material information would be to blindly enforce a contract of questionable provenance, obtained by fraudulent concealment." *Sloan*, 128 Wn. App. at 790.

Here, the PSA stated that the sale of the property was made on an "as is" and "with all faults" basis, and "without representations . . . of any kind." CP at 2273. However, because Redstone alleges that GF knew and failed to disclose certain defects, this language does not shield GF Capital from Redstone's fraudulent concealment claim. *Sloan*, 128 Wn. App. at 790. Accordingly, the "as is" clause does not bar Redstone's fraudulent concealment claim.

2. *PSA Release*

A party may release claims against another through contract. *See Hawkins v. EmpRes Healthcare Mgmt., LLC*, 193 Wn. App. 84, 93, 371 P.3d 84 (2016). Where general language in a release is followed by specific recitals, such recitals restrict the general language. *Hawkins*, 193 Wn. App at 96. Moreover, parties must clearly and affirmatively express their intent to release a fraud claim. *Hawkins*, 193 Wn. App. at 99. "At a minimum, if one party is to be held to release a claim for fraud in the execution of the release itself, the release should include a specific statement of exculpatory language referencing fraud." *Hawkins*, 193 Wn. App. at 99 (quotation marks omitted) (quoting *Living Designs, Inc. v. E.I DuPont de Nemours & Co.*, 431 F.3d 353, 371 (9th Cir. 2005)).

The PSA release stated that Redstone released any claims against GF Capital "based on breach of contract, breach of applicable law, strict liability, tort, or any other legal or equitable theory or basis of liability with respect to . . . the condition of the Property." CP at 2273. This specific language listing claims restricts the general language of the PSA release. *Hawkins*, 193

Wn. App at 96. Although the PSA release states that Redstone released tort claims generally, the PSA did not include language specifically waiving fraud claims. As a result, we hold that the PSA release does not preclude Redstone's fraudulent concealment claims.

B. *PSA Amendment Release Does Not Preclude Fraudulent Concealment Claims*

GF Capital argues that because the PSA Amendment release specifically addressed claims arising from the BL Buildings' window deficiencies, Redstone's claims are barred. We hold that there is a material question of fact on this issue.

The release in the PSA Amendment applied to "certain maintenance items identified in [the Property Condition E-mail]." CP at 794. The Property Condition E-mail detailed multiple deficiencies in the properties that were not identified in the offering memorandum. The Property Condition E-mail noted that "291 window units" in the BL Buildings would need to be replaced. CP at 798. Further, the Property Condition E-mail noted that "additional units" required resealing. CP at 798. Summarizing the deficiencies, the Property Condition E-mail listed the "Window System" as an additional repair cost of $235,000 not previously identified in the offering memorandum. CP at 798. The author of the Property Condition E-mail also stated, "Needless to say the window system and seals should have been regularly replaced and serviced to avoid the accumulated costs currently being faced." CP at 798.

Here, the parties disagree about the terms "window units" and "window systems" within the Property Condition E-mail. Br. of Appellant at 30; Br. of Resp't at 25. The Property Condition E-mail uses both terms. Also relevant to the parties' disagreement is Nanji's e-mail stating that the BL Building windows were failing, "not just the seals but the water ingress." CP at 788. Nanji testified that the water ingress he was referring to was not water intrusion into the

BL Buildings' windows generally, but rather the water into the double-paned glass that caused the window units to fog up and fail.

Redstone argues that the window deficiencies addressed in the Property Condition E-mail relate to the failed window units identified by Capitol Glass. These window units had failed because seals for the double-paned glass panels let moisture in between the panes of glass, which fogged up the windows. Redstone argues that this water ingress between the glass panels is the work priced in Capitol Glass's quotation. As a result, Redstone argues that this is the issue with the windows Nanji described. Redstone argues that the PSA Amendment did not include water intrusion or mold, rot, and decay that resulted from the break metal and failed seals of the overall window systems. As such, Redstone argues that the claimed defects were not part of the PSA Amendment release.

Conversely, GF Capital argues that it reduced the purchase price in exchange for Redstone's release of all claims regarding a broad interpretation of the term "window system." According to GF Capital, "window system" includes the seals, glaze, and break metal. In other words, "window system" refers to the window and surrounding frame. Based on this interpretation, GF Capital argues that Nanji's e-mail referencing the failing BL Buildings' windows, seals, and the ensuing "water ingress," shows that the window deficiency stated in the PSA Amendment was based on the water intrusion resulting from the failed window systems.

We hold that there is a material question of fact regarding which window deficiencies are covered by the PSA Amendment. Based on the Capitol Glass quote, Redstone's position that the PSA Amendment covers only the window units could be correct. Alternatively, GF Capital's position that the Property Condition E-mail purposefully used the "window system" to include

the entire window systems, not just the glazing, could be correct. This factual dispute cannot be resolved on summary judgment.

We hold that a question of material fact exists regarding what deficiencies were encompassed under the PSA Amendment release.

III. FRAUDULENT CONCEALMENT

At oral argument, Redstone clarified that the allegedly concealed defect was "leakage at the area of the metal panels and at the window flashing."[5] Redstone argues that the trial court erred when granting summary judgment dismissal because GF Capital fraudulently concealed water intrusion that resulted in mold, rot, and decay. We hold that issues of material fact remain regarding water intrusion.

A. *Fraudulent Concealment Legal Principles*

Fraudulent concealment occurs when (1) there is a concealed defect in the premises; (2) the seller had actual knowledge of the defect at the time of the sale; (3) the defect is dangerous to the property, health, or life of the buyer; (4) the buyer does not know of the defect; and (5) a careful, reasonable inspection of the premises by the buyer would not disclose the defect. *Obde v. Schlemeyer*, 56 Wn.2d 449, 452, 353 P.2d 672 (1960). Where the defect is apparent, a buyer cannot make a fraudulent concealment claim. *Stieneke v. Russi*, 145 Wn. App. 544, 561, 190 P.3d 60 (2008). "Once a buyer discovers evidence of a defect, they are on notice and have a duty to make further inquiries." *Douglas v. Visser*, 173 Wn. App. 823, 832, 295 P.3d 800 (2013). A

[5] Wash. Court of Appeals oral argument, *Redstone Black Lake 1, L.P. v. GF Capital Real Estate Fund-Investment I, LLC*, No. 51875-9-II (Sept. 19, 2019), at 2 min., 40 sec. (on file with court).

buyer cannot succeed even when the extent of the defect is much greater than anticipated. *Douglas*, 173 Wn. App. at 832.

The burden of proof for fraudulent concealment claims is clear, cogent, and convincing evidence. *Stieneke*, 145 Wn. App. at 561. When reviewing a case on summary judgment in which the standard of proof is clear, cogent, and convincing evidence, this court "'must view the evidence presented through the prism of the substantive evidentiary burden.'" *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Thus, on summary judgment, we must determine, viewing the evidence in the light most favorable to Redstone, whether a rational trier of fact could find that it supported its fraudulent concealment claims with clear, cogent, and convincing evidence. *See Woody*, 146 Wn. App. at 22. In evaluating an order of summary judgment, we consider only the evidence and issues called to the attention of the trial court. RAP 9.12.

B. *Material Issues of Fact Exist on Redstone's Fraudulent Concealment Claim*

Redstone argues that GF Capital fraudulently concealed that the BL Buildings experienced water intrusion from the break metal in the window systems. To prevail on this claim at trial, Redstone would have to prove that (1) there was water intrusion in the premises at the time of the sale; (2) GF Capital had actual knowledge of water intrusion at the time of the sale; (3) this condition is dangerous to property, health, or life; (4) Redstone did not know of the water intrusion at the time of the sale; and (5) a careful, reasonable inspection of the premises by Redstone would not have disclosed the condition.

GF Capital argues that the water intrusion was not concealed and Redstone had notice of water intrusion and knowledge of leaks, so this defect was known to Redstone. We hold that there are genuine issues of material fact regarding GF Capital's knowledge of water intrusion at the time of the sale, Redstone's knowledge of water intrusion through the break metal of the window systems, and whether a reasonable inspection would have revealed the water intrusion. Accordingly, we reverse summary judgment dismissal of Redstone's fraudulent concealment claim.

1. *Concealed Water Intrusion Through Window System Break Metal Caused Dangerous Conditions*

The first and third elements are not at issue here. Redstone argues that water intrusion was a concealed defect at the time of the sale and that mold, rot, and decay caused by the water intrusion were dangerous to the BL Buildings. GF Capital does not contest that these elements were met.

2. *GF Capital's Knowledge of the Water Intrusion*

Regarding the second element, Redstone argues that GF Capital knew about the water intrusion from the break metal at the time of the sale. We hold that an issue of material fact exists regarding GF Capital's knowledge of the water intrusion.

Before the parties completed the sale, GF Capital knew of repeated water intrusion issues in the buildings. At different times, Servpro and Passero worked to remediate water intrusion and the resulting mold or rot issues. However, Redstone submitted an affidavit from a certified industrial hygienist who pointed out the deficiencies in these remediation efforts. The hygienist stated that GF Capital should have opened up the walls to conduct water testing to determine the source of the leak. Instead, GF Capital merely removed moisture with humidifiers and cleaned

exposed surfaces. Additionally, Passero, one of GF Capital's subcontractors, covered up wet and rotten wood underneath the break metal at McKinley's direction. Further, before GF Capital put the BL Buildings on the market, McKinley proposed exterior repairs to prevent water intrusion. There is no evidence that GF Capital completed these repairs. Here, taking the evidence in a light most favorable to Redstone, there is a genuine issue of material fact as to whether GF Capital had knowledge of water intrusion at the time of the sale.

3. *Redstone's Knowledge of the Water Intrusion*

Regarding the fourth element, Redstone argues that it lacked knowledge of the water intrusion. We hold that there is an issue of material fact regarding Redstone's knowledge of water intrusion through the break metal of the window systems at the time of the sale.

During the due diligence period, Redstone hired two companies that performed inspections. Capitol Glass examined the windows of the BL Buildings. Capitol Glass provided a quote on recaulking and reglazing all of the windows and seals. In the quote, Capitol Glass stated, "Some of the break metal between the windows is coming off and the caulking has failed both buildings need to be checked out and fix the break metal, re seal it and or re anchored." CP at 724. During his deposition, Perry testified that the potential problem with break metal or failed caulking was water and moisture getting into the buildings.

Redstone also had Marx conduct an inspection of the BL Buildings. Marx's inspectors noted numerous issues with the windows and past signs of water intrusion. Regarding the buildings' windows, the report notes, "The various methods of installation and wet sealing suggest that there have been numerous repairs over the years due to water infiltration." CP at

773. Marx did not observe interior evidence of wall moisture, but stated that Redstone should periodically investigate for cracks and spalling to prevent water infiltration.

Here, neither report uncovered water intrusion from the break metal at the time of the sale. Redstone knew that the caulking and sealing around the windows was defective and that break metal between the windows was coming off. But, this knowledge is not the same as knowledge of water intrusion. Window systems can be structured with ribbon systems or other water redirection methods. These methods can prevent water from infiltrating the building cavity even when water gets through failed sealant or caulking. Taking the evidence in a light most favorable to Redstone, there is a question of material fact regarding whether Redstone knew about the water intrusion through the window system break metal at the time of the sale.

4. *Discovery of the Water Intrusion by a Careful, Reasonable Inspection*

Regarding the fifth element, Redstone argues that a reasonable inspection could not have revealed the water intrusion and resulting mold, rot, and decay. We hold that a question of material fact exists regarding the reasonableness of Redstone's inspection during the due diligence period.

Reasonableness is typically a question for the fact finder. *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wn. App. 1, 10, 329 P.3d 83 (2014). However, we can affirm a trial court's grant of summary judgment when no reasonable fact finder could find the conduct unreasonable. *Old City Hall*, 181 Wn. App. at 10.

Here, Redstone engaged Capitol Glass and Marx to inspect the properties. Although these inspections alerted Redstone to past water intrusion, the due diligence period did not reveal evidence of present water intrusion. However, an inspector from Plastering Plus stated that it was highly likely that the water damage, mold, and rot he discovered in October 2015 was present when the sale took place in April 2014. Taking the evidence in a light most favorable to Redstone, there is an issue of material fact regarding whether a careful, reasonable inspection would have revealed water intrusion and the resulting the mold, rot, and decay.

GF Capital argues that this court should hold, as a matter of law, that a reasonable and careful inspection under the facts of this case necessarily would have included destructive testing. This is because Redstone failed to exercise its right to conduct destructive testing, and GF Capital contends that this testing would have revealed the mold, rot, and decay which resulted from the water intrusion. However, such an inquiry is for a fact finder to determine. We hold that the trial court erred when dismissing Redstone's fraudulent concealment claim because material issues of fact exist regarding GF Capital's knowledge of water intrusion at the time of the sale, Redstone's knowledge of water intrusion through the break metal of the window systems, and whether a reasonable inspection would have uncovered the defect.

V. ATTORNEY FEES AT THE TRIAL COURT

Redstone argues that the trial court improperly awarded GF Capital attorney fees because the fraudulent concealment and negligent misrepresentation claims were not "on the contract." Br. of Appellant at 43. On appeal, Redstone concedes that the breach of warranty claim is covered by the PSA fee provision. However, Redstone argues that GF Capital did not properly segregate its fees from defending the breach of warranty claims from its fees from defending the

fraudulent concealment and negligent misrepresentation claims. Because we reverse the trial court's summary judgment dismissal of Redstone's fraudulent concealment claim, the attorney fees issue is not yet ripe, and we strike the trial court's order granting GF Capital's attorney fees award.

Here, the award of attorney fees depends on a determination of who prevailed. The PSA attorney fee provision states, "[I]f any action be commenced . . . to enforce any of the provisions of this Agreement . . . then the unsuccessful party therein shall pay all costs incurred by the prevailing party." CP at 2289.

Because we reverse the trial court's grant of summary judgment dismissal of the fraudulent concealment claim, a prevailing party is yet to be determined, and we remand to the trial court to strike the attorney fee award. The trial court's award of attorney fees was based on GF Capital successfully defending against all of Redstone's claims. However, our reversal of the trial court's summary judgment dismissal of Redstone's fraudulent concealment claim materially affects the trial court's determination. Accordingly, we remand to the trial court to strike the award of attorney fees and conduct further proceedings.

VI. ATTORNEY FEES ON APPEAL

On appeal, GF Capital requests attorney fees based on the PSA and RAP 18.1. For the reasons stated above, we decline to award GF Capital attorney fees on appeal.

We reverse the trial court's grant of summary judgment dismissal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

, A.C.J.

Lee, A.C.J.

Cruser, J.

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United States District Court, W.D. Washington, at Tacoma.

The CHAMBERLAIN GROUP, INC., Plaintiff,
v.
Shary NASSIMI, Defendant.

No. C09–5438BHS.
|
Oct. 25, 2010.

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ORDER GRANTING IN PART AND DENYING IN PART CHAMBERLAIN'S MOTION FOR SUMMARY JUDGMENT AS TO NASSIMI'S COUNTERCLAIMS

BENJAMIN H. SETTLE, District Judge.

***1** This matter comes before the Court on Chamberlain Group, Inc.'s ("Chamberlain") motion for summary judgment as to Defendant Shary Nassimi's ("Nassimi") Counterclaims (Dkt.86). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby grants in part and denies in part Chamberlain's motion for summary judgment for the reasons stated herein.

I. PROCEDURAL AND FACTUAL HISTORY

In July 2007, Chamberlain entered into an agreement ("Purchase Agreement") with Nassimi to purchase his interest, including intellectual property and inventory ownership rights, in International Electronics, Inc. ("IEI") for $14 million. *See* Dkt. 1 ¶ 17. The Purchase Agreement provided for subsequent progress payments to be made to Nassimi for any sale of IEI products that were transferred from Nassimi to Chamberlain at closing. Dkt. 112, Ex. E at 12, § 2.3. Additionally, the Purchase Agreement required that $1 million remain in an escrow account for two years from the closing date. Dkt. 1 at 21.

Chamberlain and Nassimi allege conflicting facts surrounding the negotiation of the final purchase price. Chamberlain argues that Nassimi successfully negotiated a higher "up front" cash payment from the original offer "to compensate Nassimi for the risk associated with the non-development of the concept products." Dkt. 89, Ex. 13 at 107–108. Chamberlain contends that they purposely left out language that would bind Chamberlain to develop, market, or sell any of the IEI products. *See* Dkt. 86 at 3–4. Nassimi argues that pursuant to the letter of intent sent by Chamberlain, the purchase price was $24 million, which included a $14 million up front

payment and $10 million in progress payments. *See* Dkt. 112, Ex. D at 10–13.

Nassimi contends that Chamberlain, instead of developing the IEI products, placed all of its resources into developing a non-IEI product called the Overlock and, therefore, breached the contract and violated its duty of good faith to sell the IEI products. *See* Dkt. 111 at 6. Chamberlain alleges that Nassimi submitted language to be included in the Purchase Agreement that would have bound Chamberlain to develop, market, and sell the IEI products, but Chamberlain purposely excluded those terms. *See* Dkt. 121. Nassimi argues that the $14 million plus $10 million in progress payments were offered in lieu of his original $20 million up front cash purchase price for IEI. *See* Dkt. 111 at 12.

Nassimi also alleges that, in the summer of 2009, Chamberlain improperly announced to its factory employees that it would be shutting down the Vancouver, Washington factory due to Nassimi's failure to comply with the FCC requirements. Dkt. 78 at 26–27. Additionally, Nassimi contends that Chamberlain told a customer of IEI, Ness Tagle, that Chamberlain would not be able to fulfill his future orders because Nassimi had not taken appropriate measures to maintain FCC compliant IEI products. *Id.*

***2** On July 17, 2009, Chamberlain filed its complaint against Nassimi, asserting two separate breach of contract claims. Dkt. 1. On August 21, 2009, Nassimi answered the complaint and asserted six counterclaims against Chamberlain: Count I: Specific Performance and Injunctive Relief Regarding the Escrow Fund; Count II: Breach of Contract Express Terms Regarding the Escrow Fund; Count III: Breach of the Duty of Good Faith and Fair Dealing Regarding the Escrow Fund; Count IV: Breach of Contract Express Terms Regarding the Progress Payments; Count V: Breach of the Duty of Good Faith and Fair Dealing Regarding Progress Payments; and Count VI: Defamation. *See* Dkt. 11. On August 3, 2010, Nassimi filed a second amended answer [1] and asserted a seventh counterclaim against Chamberlain, Count VI: Intentional Misrepresentation and Fraudulent Inducement [regarding the] Progress Payments. [2] *See* Dkt. 78.

On August 20, 2010, Chamberlain filed the instant motion for summary judgment on all seven of Nassimi's counterclaims. Dkt. 86. On the same day, Chamberlain also filed a motion for summary judgment on its breach of contract claims against Nassimi (Dkt.82), which Chamberlain argues is relevant for this motion. *See* Dkt. 86 at 17. Nassimi filed his response on September 13, 2010. Dkt. 111. Chamberlain filed its reply on September 17, 2010. Dkt. 121.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a

sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 253, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial —e.g., a preponderance of the evidence in most civil cases. *Anderson,* 477 U.S. at 254; *T.W. Elec. Serv., Inc.,* 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.,* 809 F.2d at 630 (relying on *Anderson,* 477 U.S. at 253). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888–89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

B. Chamberlain's Motion for Summary Judgment

***3** The Court separates Nassimi's counterclaims into three categories for discussion: (1) Contract claims and relief regarding the escrow fund (Counts I thru III), (2) contract and tort claims regarding the progress payments (Counts IV thru VI), and (3) the defamation claim (Count VII).

1. Contract Claims Regarding the Escrow Fund

Nassimi asserts three counterclaims against Chamberlain relating to the escrow account jointly held by Nassimi and Chamberlain in accordance with their Purchase Agreement. Nassimi alleges under Counts I, II and III that he is entitled to specific performance and injunctive relief, and monetary damages for Chamberlain's express breach of contract and breach of its duty of good faith and fair dealing regarding the escrow fund. In opposition, Chamberlain argues that, among other things, "[i]f the Court finds that Nassimi breached the Purchase Agreement as established in Chamberlain's Motion for Partial Summary Judgment as to Breach of Contract Liability, then all three counts fail." Dkt. 86 at 17. Significantly, Nassimi concedes that his escrow account counterclaims "turn on the outcome of

Chamberlain's breach of contract claim." Dkt. 111 at 21.

Because the Court resolved Chamberlain's motion for summary judgment on its breach of contract claim in favor of Chamberlain, Nassimi's counterclaims on this issue fail, consistent with his concession. Therefore, the Court dismisses these counterclaims.

2. Contract and Tort Claims Regarding the Progress Payments

Nassimi also asserts three counterclaims that relate directly to the earn-out payments in the Purchase Agreement. In Counts IV, V, and VI of Nassimi's counterclaims, Nassimi alleges that Chamberlain breached the express terms of the progress payments by failing to market, develop, and sell the IEI products ("Count IV"), breached the duty of good faith and fair dealing regarding the earn-out payments by failing to market, develop, and sell the IEI products ("Count V"), and intentionally misrepresented and fraudulently induced Nassimi to agree to the earn-out payments ("Count VI"). The pertinent portion of the Purchase Agreement regarding earn-out payments states:

> Section 2.3. Progress Payments. (a) Buyer shall make additional annual payments to Seller in the five (5) year period following the Closing (such payments are referred to as "Progress Payments") based on the Net Sales Revenue from the sale of the Products transferred at Closing. Progress Payments shall be payable to Seller based on a percentage of the Total Net Sales Revenue for each 12 month period in the following manner:
>
> (I) For annual Total Net Sales Revenue up to $5,000,000, the amount payable shall be five percent (5%) of Total Net Sales Revenue; and
>
> (ii) For annual Total Net Sales Revenue in excess of $5,000,000, the amount payable shall be $250,000 plus fifteen percent (15%) of Total Net Sales Revenues in excess of $5,000,000, *provided, however,* that the aggregate amount of all Progress Payments shall not exceed $10,000,000. jurisdiction, and when joinder would destroy subject matter jurisdiction.

***4** Dkt. 11 at 40.

Chamberlain argues that it had no duty under the Purchase Agreement to market and sell the IEI concept products (Nassimi's products), only a duty to "pay Nassimi *if and when* Chamberlain obtained 'Net Sales Revenues from the sale of the Products.' " Dkt. 86 at 6 (emphasis in original). Because Chamberlain did not sell any of the concept products, Chamberlain contends that there were no payments due and no breach of the Purchase Agreement. *See id.* Nassimi argues that Chamberlain attempts to rewrite the contract by adding in the "if and when" language, which does not exist in the Purchase Agreement. *See* Dkt. 111 at 9–10. The Court agrees.

Pursuant to the Purchase Agreement, Chamberlain *"shall* make additional annual payments" to Nassimi based on sales. The express language of the contract progress payment provision neither contains an express duty to develop and market the IEI products nor

an express provision that allows Chamberlain to pay Nassimi *if and when* it sells the IEI products. Under the Purchase Agreement, Chamberlain provides for an express duty to make progress payments to Nassimi without providing for any conditions that govern the sale of the IEI products, which is a prerequisite to the progress payments.

Chamberlain argues, however, that Count V of Nassimi's counterclaim should be dismissed because there "is no 'free-floating' duty of good faith and fair dealing, unattached to an existing contract term." Dkt. 86 at 7, *citing* State of Washington's Standard Form Jury Instruction WPI 302.11 (internal citations omitted). Chamberlain contends that the requirement of good faith and fair dealing must be tied to a specific contract term and there is no specific contract clause requiring Chamberlain to develop or market the IEI products. *See* Dkt. at 7. For this proposition, Chamberlain relies on *McFerrin v. Old Republic Title, Ltd.*, 2009 WL 2045212 (W.D.Wash.2009), where this Court held that "without the specific obligations, there can be no breach of the implied duty of good faith and fair dealing." Dkt. 86 at 10, *citing* *McFerrin,* 2009 WL 2045212 at *6.

McFerrin is distinguishable. In *McFerrin,* plaintiffs paid a $300 reconveyance fee as a transactional cost to defendants at the closing of the sale of their home to reconvey title from the mortgage holder back to plaintiffs. *Id.* The defendants had a third party perform the reconveyance service. *Id.* Plaintiffs sued under breach of contract and duty of good faith and fair dealing theories. *Id.* Per the escrow agreement, the reconveyance fee instructed the closing agent to "select, prepare, receive, hold, record and deliver documents as necessary to close the transaction." *Id.* There was no language specifically requiring defendants to perform the reconveyance service. *Id.* Plaintiffs alleged that defendants breached the contract by taking plaintiffs' $300 but not performing the reconveyance service—even though the title was actually reconveyed by a third party. *Id.* This Court held that the "Plaintiffs have failed to show that Defendant[s] had specific contract obligations to support their allegations of breach of contract" because the escrow agreement did not require the defendants to perform the reconveyance service. *Id.*

***5** In this case, the Purchase Agreement specifically required Chamberlain *to make progress payments of up to $10 million* to Nassimi within five years from the closing date. Because Chamberlain had a duty to make the progress payments, under Washington law, Chamberlain also had an implied duty of good faith to make progress payments to Nassimi within five years from the closing date. *See* *Badgett,* 116 Wash.2d at 569, 807 P.2d 356. Chamberlain's alleged failure to market, develop, or sell the IEI concept products may be a breach of Chamberlain's duty to make progress payments; as discussed above, a jury could reach such a conclusion, given the nature of conceptual products.

Nevertheless, Chamberlain argues that it negotiated and bargained away any duty to develop, market, or sell the IEI products, and requiring a duty of good faith and fair dealing to do so would contradict the conditions that Chamberlain and Nassimi did bargain for. *See*

Dkt. 121 at 7–9, *citing* *Badgett,* 116 Wash.2d at 570, 807 P.2d 356.

Here, because there are no express conditions that govern the sale of the IEI concept products, a pre-requisite to the progress payments, the Court may look to extrinsic evidence of the Purchase Agreement negotiations. Extrinsic evidence or parol evidence is admissible to determine the intent of the parties' agreement. *See* *Berg v. Hudesman,* 115 Wash.2d 657, 667–669, 801 P.2d 222 (1990). In *Berg,* the Washington State Supreme Court adopted § 212 of the Restatement (Second) of Contracts, which provides:

> (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
>
> (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

Id.

Because the parties did not include express provisions of the conditions surrounding the progress payments of the Purchase Agreement, the Court may look to extrinsic evidence to determine Nassimi's and Chamberlain's intent. The Court is "mindful of the general rule that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake." *Id.* However, such evidence is allowed "to prove omitted but not inconsistent terms, or to determine the intent of the parties." *Id.*

Chamberlain argues that it disavowed any obligation to develop the IEI products because it purposely rejected Nassimi's attempts to include a requirement that Chamberlain use "commercially reasonable efforts" to develop and market the IEI products during contract negotiations. Dkts. 86 at 4, 121 at 6. Nassimi contends that the "commercially reasonable efforts" clause was unnecessary and, therefore, not included because the progress payments were identified as a part of the purchase price. Dkt. 111 at 10.

***6** Because the Court finds that Chamberlain had a duty to make progress payments for sale of the IEI products, the trier of fact must determine whether Chamberlain breached its duty of good faith and fair dealing in making those progress payments. Not developing, marketing, or selling the IEI concept products may be a breach of Chamberlain's duty to make progress payments. Logically, in order to make the progress payments under the contract, Chamberlain would have to sell the IEI products. While there is no express provision requiring Chamberlain to develop and market the IEI products, a jury might conclude that Chamberlain made inadequate efforts to develop, market, and sell the IEI concept products and, therefore, Chamberlain breached its duty of good faith to make progress payments. After all, concept products

by their inherent nature require development and marketing in order to be sold.

Both Chamberlain and Nassimi submit conflicting evidence surrounding the negotiations. While Chamberlain argues that it had bargained away any duty to develop, market, or sell the IEI products (Dkt. 121 at 7–9), Nassimi argues that the course of dealing shows that the progress payment provision proves that Chamberlain had a duty to develop and market the IEI products and the Purchase Agreement reflects this because the progress payments are included as a portion of the purchase price (Dkt. 111 at 11–12). Therefore, there is a question of fact as to whether Chamberlain breached its duty to make progress payments by failing to develop and market the IEI concept products. [3]

Finally, turning now to Nassimi's Count VI claim, Nassimi states that Chamberlain

> intentionally withheld from Nassimi its plan, intent, and belief that little or no effort, expense, and resources would be placed in marketing, advertising, promoting, and selling IEI products which could result in Progress Payments under the Purchase Agreement. These intentional misrepresentations and fraudulent omissions were made by Chamberlain knowingly, and Chamberlain never intended to market, advertise, promote, and sell IEI products which could result in Progress Payments under the Purchase Agreement.

Dkt. 78. at 27.

To prove fraud in the inducement claim, Nassimi must show with "clear, cogent, and convincing evidence" that there was

> (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be acted on by the person to whom it is made; (6) the recipient's ignorance of its falsity; (7) the recipient's reliance on the truth of the representation; (8) the recipient's right to rely upon it; and (9) consequent damages.

Goel v. Jain, 259 F.Supp.2d 1128, 1136 (W.D.Wash.2003), *citing Farrell v. Score,* 67 Wash.2d 957, 958–59, 411 P.2d 146 (1966); *Kirkham v. Smith,* 106 Wash.App. 177, 183, 23 P.3d 10 (2001). Even if taken as true, Nassimi only alleges that misrepresentations were made about future events, as opposed to a presently existing fact. Moreover, Nassimi's

fraud claims should be dismissed as a matter of law because Nassimi released his fraud claims by signing a general release form at closing. *See* Dkt. 86. Under the terms of the release, Nassimi released Chamberlain from

> ***7** any and all causes of action, suits, demands, rights, claims, entitlements and losses, whether arising or pleaded in law or in equity, under contract, statute, tort or otherwise, whether known or unknown, whether accrued, potential, inchoate, liquidated, contingent, or actual, whether asserted or that might have been asserted, which any Seller Releasor now has, has ever had or may hereafter have against the respective Releasees, arising out of any matter, act, omission, cause or event occurring contemporaneously with or before the Closing Date.

Dkt. 89, Ex. 18 at 2. Chamberlain contends that the facts in this case are similar to those in *Goel,* where the court held that a general release, similar to the one used in the Purchase Agreement, released all claims, including fraud claims, despite evidence that the buyer had fraudulently induced the seller into selling his business. *Goel,* 259 F.Supp.2d at 1136. Nassimi argues that the court in *Goel* found that the "release is valid and enforceable under Washington law unless it is induced by fraud, misrepresentation or overreaching or if there is clear and convincing evidence of mutual mistake." Dkt. 111 at 19, *citing Goel,* 259 F.Supp.2d at 1136 (*quoting Nationwide Mutual Fire Ins. Co. v. Watson,* 120 Wash.2d 178, 187, 840 P.2d 851 (1992)). Nassimi contends that since the release was a part of the Purchase Agreement, and Count VI alleges that Nassimi was fraudulently induced into signing the Purchase Agreement, the release was also fraudulently induced. Nassimi argues that Chamberlain did not address the facts alleged by Nassimi as to the Purchase Agreement, and, thus, did not meet its burden of proof for summary judgment.

However, Chamberlain correctly argues that the release, as a condition of the Purchase Agreement, would release Chamberlain from Nassimi's fraud claims. In *Goel,* as here, the release was a negotiated condition of the contract. Chamberlain's alleged omissions that Nassimi relies upon to prove fraud stems from incidents that would have occurred before the Purchase Agreement and release were signed. Dkt. 78 at 25, ¶ 59.

Nassimi alleges that Chamberlain fraudulently induced Nassimi to sign the Purchase Agreement by failing to disclose Chamberlain's omission that it would not "market, advertise, promote, manufacture, and sell" the IEI products. *Id.* Nassimi argues that Chamberlain, therefore, had a duty to disclose its intention before Nassimi signed the Purchase Agreement or the release. However, in *Goel,* the court found that no such duty existed where there was not a fiduciary relationship between the parties.

> [T]he parties to an impersonal market transaction owe no duty of disclosure to one another absent a fiduciary or agency relationship, prior dealings, or circumstances such that one party has placed trust and confidence in the other. A number of factors are used to determine whether a party has a duty to disclose: (1) the relationship of the parties, (2) their relative access to information, (3) the benefit that the defendant derives from the relationship, (4) the defendant's awareness that the plaintiff was relying upon the relationship in making his investment decisions, and (5) the defendant's activity in initiating the transaction.

***8** *Id.* at 1137, *quoting* *Paracor Finance, Inc. v. General Elec. Capital Corp.,* 96 F.3d 1151, 1157 (9th Cir.1996).

Nassimi does not provide any evidence of Chamberlain's omission that it never intended to promote or sell the IEI products. Moreover, even if the Court takes Nassimi's allegations as true, there was no duty to disclose—Nassimi was an adept business man, represented by counsel in the negotiation of the sale of IEI. *See* Dkt. 111. There is no evidence of a fiduciary relationship between Nassimi and Chamberlain. This Court holds that the release signed by Nassimi contemporaneous to the Purchase Agreement "was not induced by fraud, was not the result of overreaching, and is not otherwise void or voidable." *Goel,* 259 F.Supp.2d at 1138.

> If the Court were to allow plaintiff to avoid the clear and unambiguous terms of the release, not to mention the Purchase Agreement's integration clause, "contracts would not be worth the paper on which they are written." ... Plaintiff[ ] cannot overcome the written instrument here, and, particularly, the integration clause, by invoking the fraud-in-theinducement exception to the parol evidence rule. The exception for a party who "has been induced by a fraudulent misrepresentation to enter the contact" ... must not be stretched or inflated in a way that "would severely undermine the policy of the parol evidence rule, which is grounded in the inherent reliability of a writing as opposed to the memories of contracting parties." ... We need not belabor the point. We have here the case of "a party with the capacity and opportunity to read a written contract, who [has] execute[d] it, not under any emergency, and whose signature was not obtained by trick or artifice"; such a party, if the parol evidence rule is to retain vitality, "cannot later claim fraud in the inducement."

Id. at 1138–1139 (*quoting* *One–O–One Enterprises, Inc. v. Caruso,* 848 F.2d 1283, 1287 (D.C.Cir.1988) (citations omitted)).

Furthermore, in Nassimi's deposition, he ratified the release by stating that he would abide by the terms of the release (Dkt. 122, Ex. A at 4), thus waiving his rights to his fraud in

the inducement claim. *See Poweroil Mfg. Co. v. Carstensen,* 69 Wash.2d 673, 678, 419 P.2d 793 (Wash.1966) ("The right to rescind a voidable contract may be lost where there has been a waiver or ratification. Ratification means that one affirms that which he had a right to repudiate."). The release signed by Nassimi as a condition of the Purchase Agreement clearly bars Nassimi's fraud claims. The Court grants summary judgment as to Nassimi's Count VI fraud claim in favor of Chamberlain.

3. Defamation Claim

In Count VII of Nassimi's counterclaims, he alleges that Chamberlain made false and defamatory statements against Nassimi in two separate instances: (1) employees of Chamberlain told a customer, Ness Tagle ("Tagle"), that his order for IEI products could not be fulfilled because Nassimi had not taken appropriate measures to be FCC compliant ("Tagle Communication"); and (2) representatives of Chamberlain had made an announcement to its factory employees in the summer of 2009 that Chamberlain would be closing down the Vancouver, Washington production plant because Nassimi misrepresented that the IEI products complied with FCC requirements ("Factory Employee Communication"). Dkt. 78 at 26–27. Nassimi states that Chamberlain's statements were false and defamatory and caused damage to Nassimi's reputation. *Id.* at 27, 419 P.2d 793.

***9** Chamberlain argues that even if the statements were defamatory, it is immune from liability because the two instances of communication were privileged. Dkt. 86 at 18. For a defamation claim, Nassimi must prove the following elements: "(1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages." *Moe v. Wise,* 97 Wash.App. 950, 957, 989 P.2d 1148 (1999), *citing* *Caruso v. Local Union No. 690,* 107 Wash.2d 524, 529, 730 P.2d 1299 (1987).

In Washington, courts have found a qualified privilege on numerous occasions where the statement might otherwise be defamatory. *See id.* Chamberlain asserts that its communications are protected by the common interest privilege. Dkt. 86 at 18. "The common interest privilege applies when the declarant and the recipient have a common interest in the subject matter of the communication." *Id., citing* *Ward v. Painters' Local Union No. 300,* 41 Wash.2d 859, 865–66, 252 P.2d 253 (1953).

(a) Tagle Communication

Chamberlain argues that its conversation with its customer, Tagle, is immune from a claim of defamation under the common interest privilege because Tagle wanted to know why Chamberlain was not going to fulfill a future order for IEI products. Dkt. 86 at 19. In his response, Nassimi fails to address Chamberlain's argument that the Tagle Communication was privileged. In fact, Nassimi does not even mention Chamberlain's discussion with Tagle. Under Local Rule CR 7(b)(2), "If a party fails to file papers in opposition to a motion, such failure may be considered by the court as an admission that the motion has merit." Accordingly, the Court finds Chamberlain's argument, that it's conversation with Tagle was privileged, as meritorious and grants summary judgment in favor of Chamberlain as to the Tagle Communication.

(b) Factory Worker Communication

Chamberlain contends that the Factory Worker Communication was protected under the common interest privilege because the communication took place within the company and the topic of the communication was directly attributable to the well-being of the company, which all parties had a common interest in. Dkt. 86 at 19. This Court agrees.

> The rule is based on the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them. This interest in their common affairs entitles him to information as to how they are conducted, or to information that affects the common interest, even though he is not personally concerned with the information.

Moe, 97 Wash.App. at 958, 989 P.2d 1148, *quoting* Restatement (Second) of Torts § 596, comment (c). Chamberlain's representatives were giving information to it's employees regarding information that directly affects all parties.

Nassimi argues that the communications between the Chamberlain representative and the factory workers was libel *per se* because Chamberlain acted with actual malice when it told its employees that it would be shutting down the Vancouver factory because of misrepresentations made by Nassimi. *See* Dkt. 111 at 20–21. Nassimi alleges that Chamberlain lied because the actual reason for shutting down the factory was a planned closure to relocate to Mexico. *Id.* at 20, 989 P.2d 1148. Nassimi argues that "the common interest privilege is lost without proof of knowledge or reckless disregard as to the falsity of a statement." Dkt. 111 at 20, *citing* *Moe,* 97 Wash.App. at 964–65, 989 P.2d 1148. "This description of reckless disregard is the same as the ... definition of 'actual malice.' " *Id.* at 964, 989 P.2d 1148, *citing* *Haueter v. Cowles Publ'g Co.,* 61 Wash.App. 572 n. 5, 588, 811 P.2d 231 (1991). To show that Chamberlain abused its common interest privilege, Nassimi "must overcome the same burden facing a public official plaintiff: he must prove that [Chamberlain] acted with actual malice." *Id.* at 964–965, 811 P.2d 231, *citing* *Story v. Shelter Bay Co.,* 52 Wash.App. 334, 342–43, 760 P.2d 368 (1988) (public official fault standard applied against private plaintiff in abuse of privilege analysis). "To prove actual malice a party must establish that the speaker knew the statement was false, or acted with a high degree of awareness of its probable falsity, or in fact entertained serious doubts as to the statement's truth." *Id.* at 965, 760 P.2d 368, *quoting* *Story,* 52 Wash.App. at 343, 760 P.2d 368.

***10** The issue is whether Chamberlain's claim that the reason for closing down the factory was caused by Nassimi's misrepresentation was false.[4] Nassimi has not shown with clear and convincing evidence that the statement

made by the representatives of Chamberlain to its employees was false. Nassimi only offers evidence that Chamberlain was, at sometime in the future, going to close the Vancouver factory to relocate to Mexico. Dkt. 111. There is no evidence that the Chamberlain representatives had "actual, subjective knowledge that the allegations were false." *Moe,* 97 Wash.App. at 964, 989 P.2d 1148. Nassimi cannot overcome Chamberlain's evidence that the Factory Worker Communications were made as a direct result of Nassimi's misrepresentations about the IEI products complying with FCC requirements.

Therefore, the Court grants summary judgment in favor of Chamberlain as to Nassimi's Count VII counterclaim.

III. ORDER

Therefore, the Court **DENIES** Chamberlain's motion for summary judgment as to Nassimi's counterclaims, Counts IV and V, and **GRANTS** Chamberlain's motion for summary judgment as to Nassimi's counterclaims, Counts I, II, III, VI, and VII. Nassimi's counterclaims, Counts I, II, III, VI and VII, are **DISMISSED with prejudice.**

All Citations

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Footnotes

1 The first amended answer was filed on October 21, 2009. *See* Dkt. 19.

2 In the second amended complaint, the defamation claim is Count VII of the counterclaims. Dkt. 78.

3 Chamberlain argues in a footnote that even if the Court did not dispose of Nassimi's counterclaims as a matter of law, Chamberlain did in fact make efforts to develop and market the IEI products. However, whether Chamberlain did make the necessary efforts to develop and market the IEI products is a question of fact for the jury to decide.

4 In Chamberlain's motion for summary judgment on its breach of contract claims (Dkt.82), the Court found that Nassimi breached the contract by providing IEI products that did not comply with FCC requirements. Dkt. 55. Therefore, Chamberlain's statement that Nassimi made a misrepresentation is not at issue.

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